FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 19 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 129

ADOLPH HOHENSEE, *Petitioner*,

v.

MARILYN FERGUSON, ET AL., *Respondents*

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

JAMES C. NEWTON
1934 Eighth St., N.W.
Washington, D. C.
Counsel for Petitioner

Printed by Action Printing Co., 518 5th St. N. W., Wash., D. C.

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTION AND STATUTORY PROVISIONS	2
STATEMENT	3
HOW FEDERAL QUESTIONS WERE RAISED	4
REASON FOR GRANTING WRIT	5

CITATIONS

Agricultural T. Co. v. Brubaker, 73 Pa. Super. 468	7
Alcorta v. Texas, 355 U. S. 28	11
Annotation, 80 L Ed. 1121	14
Blatt Co. v. McCarthy, 54 Pa. Super. 318	7
Bowman v. Loperenca, 311 U. S. 262, 266	14
Brikerhoff v. Hill, 281 U. S. 678, 682	9
Bryn Mawr v. James, 152 Pa. 364	7
Clarion, etc. v. Hamilton, 127 Pa. 1, 17A. 752	16
Donley v. Semons, 260 Pa. 88, 92, 93	8
Eddy v. Smiley, 26 Pa. Super. 318	7
Fiske v. Kansas, 274 U. S. 380, 385	8
Frank v. Mangum, 237 U. S. 309	10
Galpin v. Page, 85 U. S. 350, 368, 369	10
Gedrick v. Yaroscz, 102 Pa. Super. 127, 156A. 575	18
Holden v. Hardy, 169 U. S. 366	10
Hurtado v. Calif., 110 U. S. 516, 535	10
Johnson v. Eisentranger, 339 U. S. 763	15
Johnson v. Royal Ins. Co., 218 Pa. 423, 67 A. 749	7
Leishman v. Ass. Elec. Co., 318 U. S. 203, 205	13
McCable v. Atchinson, etc., 235 U. S. 151	17
Memphis v. Brown, 94 U. S. 715	14
Missouri, etc. v. Canada, 305 U. S. 337	17
Mitchel v. U. S., 313 U. S. 80	17
Mooney v. Holohan, 294 U. S. 105	11

INDEX (Continued)

	PAGE
Ohio Tel. Co. v. Comm., 301 U. S. 304	9
Pantall v. Dickey, 123 Pa. 431	7
Pasco Rural Light Co. v. Ronald, 88 Pa. Super. 245	7
P. Fister v. Northern Ill. Fin. Co., 317 U. S. 14, 150	14
Polis v. Russell, 161 Pa. Super. 456, 55A. 2d 558	6
Powell v. Alabama, 287 U. S. 45, 68	10
Pyle v. Kansas, 317 U. S. 213	11
Romberger v. Romberger, 209 Pa. 454, 139A. 157	7
Rubber Co. v. Goodyear, 73 U. S. 153	15
Samango v. Hobbs, 167 Pa. Super. 399, 75A. 2d 17	6
Saunders v. Shaw, 244 U. S. 317, 320	8
Shelby v. Bacon, 51 U. S. 56	6
Snyder v. Comm. of Mass., 291 U. S. 97, 105	8
U. S. v. Hark, 320 U. S. 531, 535	13
U. S. v. Crescent, 323 U. S. 173, 177	13-14
Union Guardian T. Co. v. Jastromb, 47 F. Supp. 689	13-15
West Ohio Gas Co. v. P. U. C., 294 U. S. 79	9
Zimmerin v. U. S., 298 U. S. 167, 169, 170	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

ADOLPH HOHENSEE, *Petitioner*,

v.

MARILYN FERGUSON, ET AL., *Respondents*

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

---

PETITION

Adolph Hohensee prays that writ of certiorari issue to review the Judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in the above entitled case on February 5, 1959, denying petitioner's petition to reconsider his petition for reconsideration.

OPINIONS BELOW

No opinions have been handed down by any of the Courts below in this matter, notwithstanding repeated efforts by petitioner for same.

The Judgments and orders of the Courts below are appended hereto.

JURISDICTION

The time for filing petition for writ of certiorari in this Court was extended to and including the 5th day of June, 1959, by order of this Court dated June 5, 1959. The Judgment of the Supreme Court of Pennsylvania having been entered on February 5, 1959. The Jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Where a statute makes no provisions for a distinction among motions constituting the basis of appeal in the Common Pleas Court, and several motions were filed by petitioner in said Court, does it violate a substantive Federal right to quash an appeal taken from the denial of several of said motions, without a hearing, when such appeal presented the question relative to which of the several orders of the trial Court constituted the final order?

2. Where a Judgment is challenged on the ground of fraud, and such challenges are not denied by the adversary, and said Judgment denies petitioner a hearing on the merits, is the petitioner denied a substantive Federal right as a result thereof?

3. In dismissing the appeal which embraces 5 distinct orders of the trial Court, did the Supreme Court of Pennsylvania misconstrue and misapply the laws of Pennsylvania thereby denying to petitioner the equal protection of the law as guaranteed under the 14th amendment to the Federal Constitution?

4. Does the Judgment of the Supreme Court of Pennsylvania deny petitioner due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant and offended provisions of the 14th amendment to the Federal Constitution are as follows: ". . . nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The statute of the Commonwealth of Pennsylvania involved is 12 P. S. 1136, the Act of May 11, 1927, which provides in part as follows: "No appeal shall be allowed in any case from an order, Judgment or decree of any Court of Common Pleas or Orphans' Court, unless taken within three calendar months from the entry of the order, Judgment or decree appeal from . . ."

STATEMENT

Petitioner filed a libel action, pro Se, "against respondents in the Common Pleas Court of Allegheny County, Pennsylvania. That thereafter respondents filed preliminary objections to petitioner's amended complaint. These preliminary objections were set down for hearing at a time when petitioner was incarcerated in a Federal Penitentiary, at the United States Medical Center, Springfield, Mo.

The original date set for said hearing was February 13, 1958, to which petitioner protested because of his incarceration, his physical incapacity, and his inability, to both obtain or retain counsel to represent him. That the prominence of the defendants was an element which reacted against petitioner in his effort to obtain counsel.

The cause was continued to February 13, 1958, for hearing on the said preliminary objections, notwithstanding the registered objections of petitioner, who was continuously incarcerated until April 13, 1958, in the absence of petitioner, the matter was heard by the said Common Pleas Court. That the said hearing resulted in the dismissal of petitioner's amended complaint.

That in consequence of the foregoing and after the release of petitioner from confinement, he filed the following motions in the Common Pleas Court of Allegheny County, in the following sequence:

1. Motion to Strike-Off Judgment, filed on May 26, 1958, and denied on same day.

2. Motion to correct clerical error in record. Filed June 20, 1958, and denied June 20, 1958.

3. Motion to open judgment. Filed August 26, 1958, and denied August 26, 1958.

4. Motion to vacate judgment. Filed August 26, 1958, and denied August 26, 1958.

The motion to strike-off judgment referred to above was first granted by Judge Montgomery of said Court, and

thereafter on the same day denied by Judge Smart of said Court without notice or hearing to petitioner.

That thereafter, and on August 26, 1958, petitioner filed his appeal in the Supreme Court of Pennsylvania, Western District, from the foregoing Judgments and Orders of the Common Pleas Court for Allegheny County.

That upon the filing of said appeal in said Court the appellees filed their motions to dismiss the appeal on the ground that said appeal was filed out of time in violation of 12 P. S. 1136. That the Supreme Court of Pennsylvania, upon consideration of the several motions, dismissed the appeal of petitioner on September 30, 1958.

That thereafter petitioner filed in said Court his petition for reconsideration which was denied on October 30, 1958.

That thereafter petitioner sought to effect an appeal to this Court and in consequence thereof filed his designation of record in the Supreme Court of Pennsylvania, but was advised by the clerk of said Court that the records designated were never transmitted to the Supreme Court of Pennsylvania by the Common Pleas Court of Allegheny County. That thereupon petitioner filed in the Supreme Court of Pennsylvania his petition for reconsideration of the petition for reconsideration, in which he raised the question of denial of due process of law and the equal protection of the law under the 14th amendment to the Federal Constitution. Said petition was denied by said Court on February 5, 1959. It is from a denial of the order dated February 5, 1959. that this petition is filed.

HOW FEDERAL QUESTIONS WERE RAISED

Substantial Federal questions were raised in the Common Pleas Court of Allegheny County in the motions to correct clerical errors in record, entered June 20, 1958, and the motion to vacate Judgment, entered August 26, 1958.

An additional Federal question was raised in petitioner's petition for reconsideration filed in the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT

A. The Judgment entered on February 26, 1958, was procured through fraud.

Fraud is at the very inception of the judgment of the said Common Pleas Court entered on February 26, 1958.

1. Motion to vacate judgment filed and refused on August 26, 1958.

The motion to vacate judgment is verified and embraces, by reference, the grounds appearing in each of the other motions filed by the petitioner. Levelling fraud at the judgment entered on February 26, 1958, paragraph 2 of said motion to vacate judgment alleges, inter alia, as follows: "That said judgment was obtained by fraud practiced by defendants upon this Court and against plaintiff, the plaintiff was threatened at the request of defendants, by the authorities of the U. S. Penitentiary, Lewisburg, Pa., that if plaintiff did not dismiss all litigation of libel and conspiracy, then pending in the U. S. District Court for the Middle District of Pa. and the Court of Common Pleas for Allegheny County, including the instant case, that he would not get parole. Plaintiff refused to dismiss such suits and was thus denied parole. Following the foregoing threat, plaintiff was further threatened with insanity and death if he still refused to dismiss said cases. Plaintiff again refused to dismiss said cases and was thereupon assaulted and nearly battered to death, was confined to the hospital as a bed patient and remained there until the 24th day of November, 1957, when the U. S. Government authorities decided that his condition of barbaric and atrocious battering was so critical that they ordered his removal to the U. S. Government Medical Center at Springfield, Missouri, where he remained a bed patient in said hospital until April 13, 1958.

That the Common Pleas Court was well aware of the inability of the petitioner to appear for the hearing which was set for February 13, 1958. That not withstanding the incarceration and physical debility of petitioner the said

Court in his absence proceeded with the hearing and on February 26, 1958, entered an order dismissing petitioner's amended complaint.

2. MOTION TO STRIKE-OFF JUDGMENT:

In the motion to Strike-Off Judgment the following allegations appear: "Because it appears from the record that defendants caused the said argument to be heard on February 13, 1958, over plaintiff's objection and purposely to prejudice plaintiff fatally."

"Because it appears from the record that defendants knew that plaintiff could not be present on February 13, 1958."

3. MOTION TO CORRECT CLERICAL ERROR IN RECORD.

The motion to strike-off judgment with affidavit attached thereto, states in paragraph 3 thereof as follows: "Plaintiff has a right to have the records show what the Court did in plaintiff's case, and correction of the record of said judgment should be made to make the record speak the truth and to conform to the facts in the case." The foregoing allegations are uncontroverted. In an early case coming up from the State of Pennsylvania, this Court said fraud or collusion may be shown to avoid proceedings before any tribunal having jurisdiction. See, *Shelby* v. *Bacon*, 51 U. S. 56, 10 How. 56. In *Polis* v. *Russell*, 161 Pa. Super. 456, 55AA. 2d 558 (1947), the Court held that: "The Order of the Court below discharging the Rule to Strike-Off the Judgment was appealable (12 P. S. Sec. 1100), and this is true notwithstanding that defendant's rule to open the Judgment was made absolute at the same time the Rule to Strike-Off Judgment was discharged by the Court below. A void Judgment may be stricken at any time."

Again in the case of *Samango* v. *Hobbs, et al.*, 167 Pa. Super. 399, 75A. 2d 17 (1950), the Court said that no time limit is attached to a void Judgment, and it may be stricken-

off at any time. In *Johnson* v. *Royal Ins. Co.*, 218 Pa. 423, 425, 67A2d, 749, the High Court of Pennsylvania said: "It is well settled, and it needs no citation of authorities to sustain the proposition, that a Judgment can be set aside or stricken-off . . . on the ground of irregularity or invalidity appearing on the face of the record, and it is not confined to any particular kind of Judgments, nor limited as to the time it may be taken advantage of."

In the case of *Romberger, etc.* v. *Romberger, et al.*, 209 Pa. 454, 139A. 157, there was a similar holding by said Court, as follows: "The order was properly made, the right of a prothonotary to enter Judgment on a note is statutory and must be strictly construed. The Judgment was void on its face as there was no right to enter a judgment against two individuals upon a separate warrant of attorney executed by each. Moreover as a void judgment it could have been stricken-off at any time."

A. Cursory reading of the amended complaint of petitioner and the preliminary objections filed thereto will disclose the validity of the amended complaint and the lack of merit in the said preliminary objections.

The long uninterrupted line of Pennsylvania decisions holding that where a judgment is void it may be stricken-off at any time, is augmented by the following cases: *Pantall* v. *Dickey*, 123 Pa. 431, *Bryn Mawr* v. *James*, 152 Pa. 364, *Pasco Rural L. Co.* v. *Ronald, et al.*, 88 Pa. Super. 245, *H. S. Blatt Co.* v. *McCarthy*, 54 Pa. Super. 463, *Eddy* v. *Smiley*, 26 Pa. Super. 318, and *Agricultural T. Co.* v. *Brubaker*, 73 Pa. Super. 468.

B. The Judgment entered February 26, 1958, denies due process under Pennsylvania law, and contravenes the 14th amendment to the Federal Constitution.

The Commonwealth of Pennsylvania is free to regulate the procedure of its Courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and

conscience of our people as to be ranked as fundamental. *Snyder* v. *Commonwealth of Massachusetts*, 291 U.S. 97, 105. This is a salutary rule based on the necessity for the prompt, efficient and just dispatch of justice to all alike.

In the instant case, the maladministration of an act of the assembly and a rule of Court with respect thereto, involved a substantial Federal right as distinguished from a mere question of procedure.

An appeal was taken to the Supreme Court of Pennsylvania in reliance upon the act of May 11, 1927, 12 P. S. 1136. In construing this act the State Court has said, "the legislature did not require the appeal to be perfected within sixth (three) months but merely provided that it should be taken or entered within that period, leaving the time for perfecting indefinite. No exact limit of time can be fixed but counsel will be required to be prompt and no more than reasonable time for diligent action will be allowed." *Donley* v. *Semons*, 260 Pa. 88, 92, 93. The said statute does not attempt to define what constitutes final judgments or what judgments, orders or decrees may be considered final.

The judgments of the Appellate Court are without evidence to support them, because the circumstances under which the appeal was taken in the lower court were the compilation of a series of motions attacking the validity of an order of the trial court entered on February 26, 1958. *The Court has made an unwarranted assumption of fact.* It is a violation of due process for a state court to enter a judgment against petitioner without affording him a reasonable opportunity to be heard. *Saunders* v. *Shaw*, 244 U.S. 317, 319, 320. The Federal Court will review a judgment of a state court where a Federal right has been denied such as in the instant case where the petitioner was incarcerated in a U. S. Penitentiary and could not be present at the hearing. *Fiske* v. *Kansas*, 274 U.S. 380, 385.

By quashing this appeal, without oral argument, the Appellate Court joined the Common Pleas Court of Allegheny County in denying to petitioner that minimal require-

ment assured to every litigant under the Fourteenth Amendment. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U.S. 79, *Brikerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 682. There can be no compromise on the footing of convenience or expediency because of a natural desire to be rid of embarrassing questions when that minimal requirement has been neglected or ignored. *Ohio Tel. Co.* v. *Comm.*, 301 U.S. 304, 305.

C. It is a violation of a substantive Federal right for a trial judge to overrule a fellow trial judge of the same court and refuse to permit the record to reflect such action.

The record shows that on May 26, 1958, petitioner's motion was granted to strike-off the judgment entered on February 26, 1958, by Judge Montgomery of the Common Pleas Court of Allegheny County.

That several days thereafter petitioner was advised by mail, by counsel for the adversary, that Judge Smart of said Common Pleas Court had signed an order on May 26, 1958, denying the very motion that Judge Montgomery had granted. The importance of the action of these two Judges is borne out by subsequent developments. The respondents have attempted to use Judge Smart's order of May 26, 1958, to show that one item of petitioner's appeal the judgment of February 26, 1958, was not filed in the Appellate Court within 3 calendar months as provided under the statute, 12 P. S. 1336. While on the other hand, Judge Montgomery's ruling granting the "Motion to Strike-Off Judgment" and stay all proceedings meanwhile tolled the said 3 months statute, especially since the judgment entered February 26, 1958, was appealable on May 26, 1958.

Petitioner upon being informed of Judge Smart's action by counsel for the adversary, as aforesaid, sought to correct this situation by filing his "Motion to Correct Clerical Error In Record". The Court refused said motion on June 20, 1958. Thus the Common Pleas Court has denied to petitioner substantial rights which constitute a denial of due

process of law. The failure of the Court to make the correction has resulted in an injustice arising from an act of the Court, since May 26, 1958, was within the time allotted for appeal as aforesaid.

Due process of law required a correction of the record to show what the Court did in petitioner's case and to make the record speak the truth and conform to the facts in the case. The phrase "due process of law" antedates the establishment of our institutions. It embodies one of the broadest and most far reaching guaranties of personal and property rights. It is necessary for the enjoyment of life, liberty and property that the constitutional guaranty be strictly complied with as emphasized in the case of *Frank* v. *Mangum*, 237 U.S. 309, *Holden* v. *Hardy*, 169 U.S. 366, and *Hurtado* v. *California*, 110 U.S. 516, 535, and quoted thus:

"It has never been doubted by this Court, that notice and hearing are preliminary steps essential to the passing of an enforcible Judgment, and that they, together with a legally competent tribunal, having jurisdiction of the case, constitute basic elements of constitutional requirement of due process of law." *Powell* v. *Alabama*, 287 U.S. 45, 68.

In *Holden* v. *Hardy*, *supra*, it was held that the necessity of due notice and an opportunity of being heard was described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard." Trial Judge Smart in the Common Pleas Court not only denied petitioner due process of law when he overrode Judge Montgomery, but also denied him his substantial State and Federal right when the said Judge refused to correct the record in order that the record might correctly show his action and the action of Judge Montgomery, and that the record might be permitted to speak the truth.

Mr. Justice Fields in the early case of *Galpin* v. *Page*, 18 Wall. 350, 368, 369, 85 U.S. 350, 368, 369, said that the rule, that no one should be personally bound until he has had his day in Court, was as old as the law, and it meant that

one must be cited to appear and afforded an opportunity to be heard; that: "Judgment without such citation and opportunity is void of all the attributes of a judicial determination; it is judicial usurpation and oppression, never can be upheld where justice is justly administered." What then does a hearing include? Historically and in practice, in our land, it has always included the right to appear personally or through counsel. The right to be heard would be of no avail if it were devoid of these attributes. It was to no avail to petitioner that respondents were able to set their preliminary objections down for hearing on February 13, 1958, at a time that respondents knew petitioner was incarcerated in a Federal penitentiary and could not be present personally. Respondents also knew that petitioner would not be represented by counsel because of the prominence of respondents. Counsel were reluctant to oppose them because of such prominence. The instant appeal and the facts preceding it in the Common Pleas Court resemble greatly the situation which developed in *Alcorta* v. *Texas*, (1957), 355 U.S. 28. There this Court held that the petitioner was denied due process of law when the prosecution permitted its own witness to commit perjury on the witness stand in order to obtain a conviction against petitioner. This court in commenting on the perjured testimony of Castilleja said that: "under the general principle laid down by this Court in *Mooney* v. *Holohan*, 294 U.S. 103, and *Pyle* v. *Kansas*, 317 U.S. 213, petitioner was not accorded due process of law. It cannot seriously be disputed that Castilleja's wife was, nothing more than that of casual friendship. This testimony was elicited by the prosecutor, who knew of the illicit intercourse between Castilleja and petitioner's wife. Undoubtedly Castilleja's testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate cause for a surge of sudden passion in which he killed his wife. If Castillejas' relationship with petitioner's wife had been truthfully portrayed to the jury it would have, apart from impeaching

his credibility, tended to corroborate petitioner's contention that he had found his wife embracing Castilleja."

It is a like analogy that the action of Judge Smart of the Common Pleas Court is highly prejudicial in the petitioner because he overruled his fellow judge without affording petitioner a hearing and he refused to correct the record so as to disclose his true action.

D. Judgment of Supreme Court of Pa. denies petitioner the equal protection of the law as applied in Pa. and denounced under the Fourteenth Amendment.

Respondents, through their motion in the Supreme Court of Pennsylvania to quash the appeal in said court, contended that in the Common Pleas Court the appeal was not timely prosecuted, and in consequence thereof the said Appellate Court was without jurisdiction to entertain the appeal. This contention assumed that there was but one appealable judgment, and that judgment was entered on February 26, 1958. This argument rejected the judgments of the Common Pleas Court entered on May 26, 1958, June 20, 1958, and August 26, 1958.

It is the position of the petitioner that the judgment of the Common Pleas Court entered February 26, 1958, was not the only appealable judgment in the proceedings in the trial court. That each of the subsequent judgments entered was equally appealable.

The untenable action of Judge Smart having the effect of overruling a previous order of Judge Montgomery, in which the latter had granted a rule to show cause why the judgment entered on February 26, 1958, should not be stricken-off, and staying the operation of said judgment in the meanwhile, denied to petitioner the equal protection of the law as applied to litigants of Pa. and guaranteed under the 14th Amendment to the Federal Constitution.

During the court proceeding the said action of Judge Montgomery had tolled the operation of the Pa. statute (12 P.S. 1136).

Consequently the judgment that the court entered on February 26, 1958, became inoperative and devoid of any finality.

A Court has plenary power while the term is in existence to modify or vacate its judgment and the action of Judge Montgomery was within this rule. *Zimmerin* v. *United States*, 298 U.S. 167, 169, 170. In the instant case if the action of Judge Montgomery had not been interferred with by Judge Smart, the said rule to show cause, and stay of Judgment, would have been entered on May 26, 1958, and would plainly have governed, on the issue of time, for filing the appeal in the Appellate Court. It has been held by this Court that where the date of entry of a final decree is in doubt the decrees may be examined to determine the intention of the courts as to the act constituting its final judgment. *United States* v. *Hark*, 320 U.S. 531, 535. Here, as in the *Hark* case, it is not to be assumed that the Court's entries of judgments of May 26, June 20, and August 26, 1958, were intended to be empty forms. If the judgment of February 26, 1958, is to stand as the final judgment, in the light of the foregoing developments, then the provisions under the Pa. Civil Procedure rules are but empty gestures. See, *Union Guardian Trust Co.* v. *Jastromb*, 6 Cir. 47 F. 2d 689. And the filing of subsequent motions are ineffectual. The fact that the Common Pleas Court acted upon each of the motions filed by petitioner is in itself sufficient to make the August 26, 1958, order of said court its final order.

It is well settled by decisions of this Court that, "where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion." *Letshman* v. *Associated Electric Co.*, 318 U.S. 203, 205; and *U. S.* v. *Crescent Amusement Co.*, 323 U.S. 173, 177. Likewise this court has held that an untimely petition for a rehearing or to amend a judgment, if entertained or considered on its

merits, has the same effect of a timely petition. *Bowman* v. *Loperena*, 311 U.S. 262, 266, and cases cited; compare *P. Fister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 150. In these circumstances, "the judgment of the court as originally entered does not become final" until the action of the court on such petition, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, *supra*. In the Bowman case and each of the three cases it cited, the ultimate petition for rehearing, although considered by the lower court, was denied. The problem presented in those cases was therefore more difficult than that raised here. The problems are parallel to the extent that the efforts to change the judgment were unsuccessful.

Indeed, the general rule in this county is: "that where a judgment, order, or decree is amended or modified the time within which an appeal from such determination may be taken begins to run from the date of the amendment or modification." See, Annotation, 80 L. ed. 1121, and *Memphis* v. *Brown*, 94 U.S. 715. An afortiori, since the order of Judge Montgomery of May 26, 1958, stayed the judgment of February 26, 1958, the time could not have begun to run before May 26, 1958.

If the original judgment is effected or stayed by a subsequent order or judgment, the time for appeal is extended with respect to all of its provisions. If the question were open, wise judicial policy would dictate such a result. But the question is not open, although there seems to have been so little doubt about it that the answers have been assumed without explanation. Thus in *U. S.* v. *Crescent Amusement Co.*, 323 U.S. 173, 177, the plaintiff's time to appeal was held to be extended by the defendant's motion to amend the findings, although the amendments to the findings did not relate to the portion of the judgment from which the plaintiff was appealing.

In *Memphis* v. *Brown*, 94 U.S. 715, 718, this Court said: "The form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as for

that date. This the Court had a right to do during the term and for the very purpose of giving it effect for a supersedeas."

In *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689, the 6th Circuit Court said: "The order of March 18 does not expressly vacate the order of March 7, but we think it should be considered as having that effect. It covered exactly the same subject matter, and there could have been no object in entering it, unless it was intended to supersede the earlier order."

The order of Judge Montgomery, dated May 26, 1958, staying the judgment of February 26, 1958, comes within the meaning of the for going cases. Similarly, in *Johnson* v. *Eisentranger*, 339 U.S. 763, the Government's petition for certiorari was filed within 90 days of the denial of respondent's petition for rehearing below, not within 90 days of the original order.

Speaking of subsequent orders of the Court, this Court in the case of *Rubber Co.* v. *Goodyear*, 6 Wall. 153, 73 U.S. 153, observed that an order had been entered on the Court's minutes on November 28. On December 5, the Court entered another order, captioned "Final Decree" which was for the most part in the very language of the earlier order and which made no change of substance in that order. This Court then held that an appeal taken from the December order was timely because the latter order was the final order in the cause. This Court further stated at pp. 155-156 that: "We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the Court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court apparent on the face of the proceeding. We must hold, therefore, the decree of December the 5th to be the final decree."

It may be noted from the record that on May 26, 1958, petitioner filed his "Motion to Strike-Off Judgment," entered on February 26, 1958. That on said occasion, peti-

tioner requested Judge Smart, in his chambers, to act on said "Motion to Strike-Off Judgment" and the "Rule to Show Cause" in conjunction therewith, which Judge Smart declined to do, referring petitioner to the motion's Court, then presided over by Judge Montgomery. Thereupon petitioner presented said motion in open court, and Judge Montgomery granted the "Rule to Show Cause," and stayed all proceedings in meanwhile requested therein. Petitioner was taken by surprise when several days thereafter he received in the mail a notice from counsel for the adversary that Judge Smart had entered an order on May 26, 1958, refusing petitioner's motion to strike-off judgment. Moreover, the said refusal of Judge Smart to strike-off judgment was determined without notice or hearing to petitioner. The aforesaid "Star Chamber" ruling of Judge Smart was not only prejudicial to petitioner but equally violative of the rules of the Common Pleas Court. The further question proposed is the propriety of one Common Pleas judge overruling the action of another Common Pleas judge involving the same subject matter and pleading.

The Supreme Court of Pennsylvania has held, as far back as 1889, that where a motion to Strike-Off Judgment challenges the validity of a judgment and characterizes it as void, the time for taking an appeal begins to run from the date of the denial, or granting of the motion to strike-off judgment. *Clarion, etc.* v. *Hamilton,* 127 Pa. I, 17AA. 752.

It was held in the case of In re: Crescent Township Road, (1901), 18 Pa. Super. 160, that the time within which a party may appeal from the refusal to Strike-Off or quash a decree or order, void on its face, does not begin to run until the ruling on said motion.

The foregoing decisions, coupled with the ruling of Common Pleas Judge Smart, clearly demonstrate the denial, to petitioner, of the equal protection of the law clause, under the Fourteenth Amendment to the Federal Constitution.

See, Missouri Ex. Rel., *Gaines v. Canada*, 305 U.S. 337, 344, 345; *McCable* v. *Atchinsin, etc.*, 235 U.S. 151, 160, 162; and *Mitchel* v. *United States*, 313 U.S. 80.

The undisputed facts appearing in the instant record show, conclusively, the circumstances underlying the ruling of Judge Smart. The denial to this petitioner, his constitutional right to be heard on his motion to Strike-Off Judgment, is an invasion of a fundamental right protected by the Fourteenth Amendment.

And in view of the nature of the right denied, and the method used in consummating the denial, it is evident that the constitutional policy adopted by the Court has been invaded.

E. It is apparent upon the face of the record that the judgment entered February 26, 1958, is void.

The amended complaint filed by petitioner in the Common Pleas Court of Allegheny County, Pa., complies with the rules of pleadings under the Pennsylvania law in every respect.

All of the decisions of the Pennsylvania courts support the validity of the amended complaint. Petitioner's motion to Strike-Off Judgment presented to the trial court the following basic objections: (a) Denial of the right to be heard, (b) fraud, and (c) the validity of the amended complaint.

The amended complaint was challenged by preliminary objections. The record discloses that these preliminary objections were without substance and should have been overruled. These errors are apparent upon the face of the record, in which the Judgment of February 26, 1958, is entered.

The law is well settled in Pennsylvania that where a motion to Strike-Off Judgment is directed to errors appearing on the record, and such motion is denied, the time for taking an appeal begins to run from the refusal of the motion to STRIKE-OFF JUDGMENT. Thus in the case of

Gedrick v. *Yaroscz, et al.*, (1931), 102 Pa. Super. 127, 156A. 575, the facts showed that on May 31, 1929, plaintiff caused writs of scire facias to be issued in the Court below on two mechanics' liens which he had filed against two pieces of property belonging to defendants. Defendants filed affidavits of defense, and plaintiff entered in each case a rule for judgment for want of a sufficient affidavit of defense. After arguments on the rule, the court below on November 1, 1929, filed an opinion and entered an order thereon giving judgment for want of sufficient affidavit of defense, and granting leave to defendant to file supplemental affidavit of defense within 15 days. On November 29, 1929, when no supplemental affidavit had been filed, plaintiff's attorney filed with the prothonotary praecipes for judgments as per order of court, and judgments were accordingly entered. On April 19, 1930, defendants filed supplemental affidavits of defense, and on April 21, 1930, they filed motions to Striffe-Off and Open Up judgments entered on November 29, 1929. On June 18, 1930, the Court denied the motions, and discharged the rule, and approved the entry of Judgments of November 29, 1929. Defendants appealed from the Order of Court dated June 18, 1930, denying their motions and discharging their rules. Appellees thereupon moved to Quash the appeal on the ground that they were not taken within three months from the entry of Judgment of November 29, 1929. The Court held that: "If the appeals had been taken from these Judgments (Judgments of November 29, 1929), they would have been too late. But as the appeal which are sanctioned by the act of May 20, 1891, P. L. 101 (12 U.S. 3110, 1164), were taken from the orders, refusing to Strike-Off, and To Open those Judgments, they were in time. It follows that the motion to quash the appeal must be dismissed."

CONCLUSION

For the reasons stated herein above it is respectfully submitted that the petition for Writ of Certiorari should be granted.

JAMES C. NEWTON
1934 Eighth St., N.W.
Washington, D. C.
Counsel for Petitioner

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 3

MARCH TERM, 1959

ADOLPH HOHENSEE, *Appellant*

v.

MARILYN FERGUSON

Appeal from the judgments of the Court of Common Pleas of the County of Allegheny

---

No. 1737 July Term, 1957

Certified from the Record

January 30, 1959, Petition for Reconsideration of Petition for Reconsideration filed.

ORDER

February 5, 1959, petition dismissed by the Court,

JONES, *Chief Justice*

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court at Pittsburgh, Pa. this 30th day of April 1959.

PATRICK N. BALSINGER
Prothonotary

No. 3 March Term, 1959

SUPREME COURT

ADOLPH HOHENSEE, *Appellant*

v.

MARILYN FERGUSON

CERTIFIED COPY OF RECORD

CERTIFIED COPY OF ORDER

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ADOLPH HOHENSEE, *Plaintiff*

v.

MARILYN FERGUSON, *Defendant*

No. 1737 July Term, 1957

Trespass

MOTION TO STRIKE OFF JUDGMENT

ORDER

May 26, 1958, the within motion refused.

BY THE COURT
SMART, J.

Certified to be a true and complete copy of original.

ADOLPH HOHENSEE

Filed May 26, 1:11 P.M., 1958.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ADOLPH HOHENSEE, *Plaintiff*
v.
MARILYN FERGUSON, *Defendant*

No. 1737 July Term, 1957

Trespass

MOTION TO CORRECT CLERICAL ERROR IN RECORD

Now comes plaintiff in the above-entitled cause and moves the court to correct the clerical error in the record of its judgment of May 26, 1958, which should show that the "Motion to Strike Off Judgment" received in this court on May 26, 1958, was granted, instead of "refused," and for the entry of such correction nunc pro tunc, and for such other relief which to this court may seem just and proper, for the following reasons:

1. Failure to make the correction nunc pro tunc would result in injustice arising from an act of the court, since May 26, 1958, was within the time allotted for appeal, and to make such motion.

2. Judgment nunc pro tunc would simply consummate what the court adjudged but imperfectly performed.

3. Plaintiff has a right to have the records show what the court did in plaintiff's case, and correction of the record of said judgment should be made to make the record speak the truth, and to conform to the facts in the case.

4. In the case of an error by the clerk, it is declared that the action of the court should not be permitted to be falsified by a failure of a ministerial officer to perform his duty.

5. Affidavit is attached to help the court to recall the facts herein.

ADOLPH HOHENSEE, *pro se*
P.O. Box 910
Scranton, Pa.

Date:

June 20, 1958. Order of Court.
June 20, 1958. Motion Refused.

DUFF, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ADOLPH HOHENSEE, *Plaintiff*
v.
MARILYN FERGUSON, *Defendant*

No. 1737 July Term, 1957

Trespass

MOTION TO VACATE JUDGMENT

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ADOLPH HOHENSEE, *Plaintiff*
v.
MARILYN FERGUSON, *Defendant*

No. 1737 July Term, 1957

Trespass

MOTION TO OPEN JUDGMENT

Filed: August 26, 9:24 A.M. 1958.

Subscribed and sworn to before me this 11th day of August, 1958.

My commission expires Jan. 1, 1962.

ED. W. GAUKONDER, SEAL
Alderman
23rd Ward, Scranton, Pa.

August 26, 1958.

Motions to vacate judgments refused.

BY THE COURT
O'BRIEN, J.

Eo die, exception noted to plaintiff.

HENRY X. O'BRIEN, J.

Filed August 26, 9:26 A.M. 1958.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ADOLPH HOHENSEE, *Plaintiff*
P.O. Box 910, Scranton, Penna.

v.

MARILYN FERGUSON, *Defendant*
c/o Hearst Pub. Co., Inc., Telegraph Square, Pittsburgh, Pa.

No. 1737 July Term, 1957

Trespass

Before SMART, NIXON and LEWIS, JJ.

ORDER

And Now, to-wit, February 26, 1958, the above entitled matter having come on for argument on February 13, 1958, on the preliminary objections of defendant, pursuant to the order of Court of December 19, 1957, filed at No. 1739 July Term, 1957, and the Court having been advised by telephone at 9:30 A.M. on February 13, 1958, by the brother of plaintiff that plaintiff had received notice of this argument and requested a further continuance of the argument, which was refused for the reason that this case had already been continued several times as set forth in the memorandum opinion of December 19, 1957, filed at No. 1739 July Term, 1957, which by reference is made part hereof; that neither plaintiff nor a representative of plaintiff appeared, and the Court having heard arguments on behalf of the above defendant on the preliminary objections filed by defendant, after consideration thereof and of the briefs submitted in support thereof, it is hereby ordered that the respecti preliminary objections filed by defendant above named be and the same are hereby sustained, and the plaintiff's complaint and amended complaint be and the same are hereby dismissed at the costs of the plaintiff.

By the Court
Walter P. Smart
Clarence B. Nixon
Lobar L. Lewis

So die, exception noted to plaintiff and bill sealed.

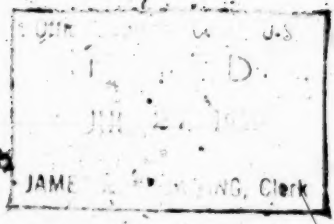
Walter P. Smart, *Judge*

Filed Feb. 26, 1958, 11:05 A.M.

From the Record
David B. Roberts
Prothonotary
By Louis W. Sauers, *Deputy*

EXHIBIT "A"

FILE COPY



IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 129

ADOLPH HOHENSEE, Petitioner

v.

MARILYN FERGUSON, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. S. MOORHEAD, JR.
DAVID W. CRAIG
MOORHEAD & KNOX
Counsel for Respondent

1732 Oliver Building
Pittsburgh 22, Pennsylvania

SMITH BROS. CO., INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX TO BRIEF

PAGE

Opinions and Record Below 1

Counter-Statement of Questions Presented 2

Counter-Statement of the Case 2

Argument 5

I. No federal question is involved because the petition merely seeks review of the Pennsylvania Supreme Court's refusal to entertain a second rehearing request 5

II. No review is allowable as to the quashing of petitioner's state court appeal 5

A. Petitioner's attempt to seek review of the Pennsylvania Supreme Court decision of September 30, 1958, quashing the appeal to it, comes too late 5

B. The quashing of petitioner's appeal by the Pennsylvania Supreme Court was proper and involved no federal question 7

Conclusion 13

TABLE OF CITATIONS

STATUTES

28 U.S.C. § 2101 6

RULES

Pennsylvania Rules for Procedure No. 1017(b) 2

CASES

American Surety Co. v. Baldwin, 287 U.S. 156, 168, 77 L. Ed. 231, 239 10

Baily Petition, 365 Pa. 613, 619; 76 A. 2d 645, 648 10

Beaver Valley Water Co. v. Pa. P.U.C., 140 Pa. Super. 297, 302; 14 A. 2d 205, 208 10

Clarion M. & P. R. Co. v. Hamilton, 127 Pa. 1, 3; 17 Atl. 752 11

CASES PAGE

Commonwealth v. Mackley, 380 Pa. 70, 75; 110 A. 2d 172, 175 9

Crescent Township Road, 18 Pa. Super 160, 167 11

Department of Banking v. Pink, 317 U.S. 264, 266, 87 L. Ed. 254, 256 6

Federal Communications Com. v. Station WJR, 337 U. S. 265, 274, 275; 93 L.Ed. 1353, 1360 12

Fenerty Disbarment Case, 356 Pa. 614, 619; 52 A. 2d 576, 578 9

Friel v. Beadle, 320 Pa. 204, 182 Atl. 517 12

Gryger v. Burke, 334 U. S. 726, 731; 92 L.Ed. 1683, 1687 8

Gypsy Oil Company v. Escoe, 275 U.S. 498, 499; 72 L. Ed. 393 7

Hanna Estate, 367 Pa. 337, 339; 80 A.2d 740, 741 9

Johnson v. Royal Ins. Co., 218 Pa. 423, 425; 67 Atl. 749 11

McDonald v. Oregon R. & Nav. Co., 233 U.S. 665, 669, 670; 58 L.Ed. 1145, 1148 8

Neblett v. Carpenter, 305 U.S. 297, 302; 83 L.Ed. 182, 187 8

Pennock v. Kennedy, 153 Pa. 579; 26 Atl. 217 12

Potts v. Russell, 161 Pa. Super. 456, 55 A.2d 558 10

Price v. Johnston, 334 U.S. 266, 286; 92 L.Ed. 1356, 1369 12

Romberger v. Romberger, 290 Pa. 454; 139 Atl. 159 11

Samango v. Hobbs, 167 Pa. Super. 399; 75 A.2d 17 11

Seem's Estate, 341 Pa. 198, 199, 200; 19 A.2d 60, 61 9

Standard Oil Company of Indiana v. Missouri, 224 U.S. 270, 286, 287; 56 L.Ed. 760, 769 8

Sullivan v. Phila., 378 Pa. 648, 649; 107 A.2d 854, 855 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 129

ADOLPH HOHENSEE, Petitioner

v.

MARILYN FERGUSON, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS AND RECORD BELOW

Petitioner's designation of the record does not indicate that any portion of the record in the Supreme Court of Pennsylvania has been filed. Therefore, respondent has filed herewith, pursuant to Rule 21 (6), the certified docket entries of this cause in the Supreme Court of Pennsylvania, together with certified copies of the principal motions and petitions filed in that Court. (R, Items 11-15).

From the record of the Common Pleas Court of Allegheny County, Pennsylvania, respondent has also filed herewith a certified copy of Memorandum Opinion and Order of that Court, dated December 19, 1957. (R. Item 16).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is any federal question involved in a state appellate court decision which consists only of a refusal to entertain a "Petition for Reconsideration of a Petition for Reconsideration" of that court's earlier action quashing an appeal to it as having been taken too late?

2. Will this court review a state court decision quashing an appeal to it where such decision was entered more than seven months prior to any action seeking certiorari from this court?

3. Is any federal question involved where a state appellate court construes its appeal-time statute so as to measure appeal time from the date of judgment rather than from subsequent "motions" to strike, vacate or open such judgment?

COUNTER-STATEMENT OF THE CASE

Petitioner, in May, 1957, filed a civil libel complaint against respondent in the Common Pleas Court of Allegheny County, Pennsylvania.

Respondent opposed the complaint with preliminary objections, under Pennsylvania Rule of Civil Procedure No. 1017(b), thus raising questions of law including, inter alia, the statute of limitations and demurrers based on privilege and failure of the complaint, in other respects, to state a cause of action.

Respondent then filed an amended complaint, against which substantially the same preliminary objections were renewed. (R. Items 1, 2)

As is set forth in the lower court's Memorandum Opinion of December 19, 1957 (R. Item 16), the court

first granted petitioner continuances with respect to an argument on those questions of law. After another request from petitioner for further continuance in order to make arrangements for representation, the court found that petitioner had sufficient notice and ample time to make arrangements for representation. Nevertheless, the lower court granted petitioner another extension of time, from December 19, 1957, to February 13, 1958.

On February 13, 1958, the lower court refused to allow petitioner further continuance and proceeded to consider the questions of law, in default of any appearance for petitioner. Pursuant to such consideration of the complaint and the preliminary objections, the lower court, on February 26, 1958, sustained the preliminary objections and dismissed the complaint, without leave to amend further. (R. Item 4; Pet. Cert., Appendix, p. 6)

Notice of the February 26th judgment was sent to petitioner on February 28, 1958. (R. Item 10; Docket Entries) Petitioner did not appeal the February 26th judgment to the appellate court but instead, on May 26, 1958, filed in the lower court a "Motion to Strike Off Judgment." (R. Item 5) This motion was refused the same day by Judge Smart of the lower court. No rule to show cause was granted on that motion, nor was it entertained, by Judge Montgomery or any other judge, as is shown by the fact that the court, on June 20, 1958, refused petitioner's "Motion to Correct Clerical Error in Record" (R. Item 6), which claimed otherwise.

On August 26, 1958, petitioner devised and filed various other "objections" and "motions" in the lower court

(R. Items 3, 7, 8), all of which were refused the same day (R. Item 9).

Then, also on August 26, 1958, petitioner filed his appeal to the Supreme Court of Pennsylvania.

Respondent filed in the Pennsylvania Supreme Court a Motion to Quash or Dismiss Appeal (R. Item 12) on the ground that the appeal was taken too late; i.e., more than three months following the final judgment of dismissal entered February 26, 1958. To this motion, petitioner filed a reply (R. Item 13).

The Pennsylvania Supreme Court, in accordance with its rules, proceeded without oral argument to consider the motion and reply and, on September 30, 1958, entered its order which stated that the ". . . appeal is quashed for the reason that it was taken out of time." (R. Item 11, Docket Entries, Pa. S. Ct.)

On October 30, 1958, the Pennsylvania Supreme Court denied a "Petition for Reconsideration" filed by petitioner (R. Item 14).

Then, after attempting an appeal to this court (October Term 1958, No. 1015), petitioner returned to the Supreme Court of Pennsylvania to file his "Petition for Reconsideration of Petition for Reconsideration" (R. Item 15), which was dismissed February 5, 1959.

Pursuant to two extensions of time granted by this court, petitioner has now filed his Petition for Writ of Certiorari, to review the Pennsylvania Supreme Court order of February 5, 1959, which dismissed his "Petition for Reconsideration of Petition for Reconsideration".

ARGUMENT

I. No federal question is involved because the petition merely seeks review of the Pennsylvania Supreme Court's refusal to entertain a second rehearing request.

The Petition for Writ of Certiorari expressly seeks review of the decision of the Pennsylvania Supreme Court dated February 5, 1959. (Pet. Cert. p. 1)

That February 5th decision involved no question of the merits of the case nor any constitutional question, but only whether or not the Pennsylvania Supreme Court should reconsider its still earlier decision, which had quashed petitioner's appeal to it as being too late.

Respondent submits that the February 5th refusal of the Pennsylvania Supreme Court to reconsider its former refusal to entertain a rehearing is obviously a decision involving no federal question.

II. No review is allowable as to the quashing of petitioner's state court appeal.

A. *Petitioner's attempt to seek review of the Pennsylvania Supreme Court decision of September 30, 1958, quashing the appeal to it, comes too late.*

The Petition for Writ of Certiorari is devoted primarily to questioning the quashing of the appeal by the Pennsylvania Supreme Court on September 30, 1958, despite petitioner's explicit averment that the reconsideration dismissal of February 5, 1959 is the order sought to be reviewed.

In its September 30, 1958 order, the Pennsylvania Supreme Court quashed petitioner's appeal ". . . for the reason that it was taken out of time."

Argument.

On October 21, 1958, petitioner filed with the Pennsylvania Supreme Court his Petition for Reconsideration (R. Item 14), which was denied by that court on October 30, 1958. (R. Item 11, Docket Entries)

The "Petition for Reconsideration of the Petition for Reconsideration" was filed by petitioner on January 30, 1959 and summarily dismissed February 5, 1959. (R. Item 11, Docket Entries)

Petitioner's first action relative to seeking certiorari from this court was his application for extension of time, filed May 5, 1959, more than seven months after the appeal-quashing decision of September 30, 1958.

Petitioner's first Petition for Reconsideration did not toll or suspend the running of the ninety-day limitation fixed by 28 U.S.C. § 2101 with respect to certiorari applications. That first rehearing petition, filed on October 21, 1958, more than ten days after the September 30th decision, was too late because Pennsylvania Supreme Court Rules 69 and 73 require that such rehearing petitions be submitted within the ten-day period provided for the remittitur of the record to the lower court. A rehearing petition must be timely in order to toll the running of the period allowed for seeking certiorari review. *Department of Banking v. Pink*, 317 U.S. 264, 266, 87 L. Ed. 254, 256 (1942).

Moreover, the time limitation for seeking certiorari as to the September 30, 1958 decision was not tolled by the subsequent Petition for Reconsideration of Petition for Reconsideration (R. Item 15), filed in January and dismissed February 5, 1959. Even if the time for initiating certiorari proceedings here had been suspended by a timely filing of the first petition for rehearing, it

would have begun to run again from the October 30th denial of rehearing and no further suspension could have been obtained by the presentation of a second rehearing petition seeking reconsidration of the first one. *Gypsy Oil Company v. Escoe,* 275 U. S. 498, 499; 72 L. Ed. 393 (1927).

Thus, the certiorari time limitation must be computed from October 30, 1958, at the latest. Of course, more than six months elapsed between that date and May 5, 1959, the date petitioner first commenced his proceedings seeking certiorari here.

Respondent therefore submits that petitioner's action here, like his action below, has been taken out of time.

B. *The quashing of petitioner's appeal by the Pennsylvania Supreme Court was proper and involved no federal question.*

The Pennsylvania Supreme Court, by quashing petitioner's appeal of August 26, 1958, clearly indicated that it was computing the three-month Pennsylvania appeal period from the complaint dismissal judgment of the Common Pleas Court, dated February 26, 1958, rather than from any of the subsequent "motions" which petitioner devised and filed in the lower court.

In thus interpreting and applying a state appeal time-limitation statute, the Pennsylvania Supreme Court decision gave rise to no federal question whatsoever.

The point at which litigation must cease is left to the discretion of the legislative power of the state. It is not essential for due process that any right of appeal be

provided: *Standard Oil Company of Indiana v. Missouri*, 224 U.S. 270, 286, 287; 56 L.Ed. 760, 769 (1911).

The due process clause of the Fourteenth Amendment does not control the details of state judicial procedure nor does it give this court jurisdiction to review alleged misinterpretations of state procedural law by a state court: *McDonald v. Oregon R. & Nav. Co.*, 233 U.S. 665, 669, 670; 58 L.Ed. 1145, 1148 (1913).

Even if the Pennsylvania Supreme Court had erred in the interpretation of its appeal statute, no denial of due process would be involved: *Gryger v. Burke*, 334 U.S. 726, 731; 92 L.Ed. 1683, 1687 (1947); *Neblett v. Carpenter*, 305 U.S. 297, 302; 83 L.Ed. 182, 187 (1938).

However, the appeal-time computation of the Pennsylvania Supreme Court in this case was clearly correct.

The Common Pleas Court judgment of February 26, 1958 was a final and appealable judgment because it dismissed petitioner's amended complaint without leave to amend further: *Sullivan v. Phila.*, 378 Pa. 648, 649; 107 A. 2d 854, 855 (1954).

The last day on which that final judgment could have been appealed was May 26, 1958. However, on that day, instead of taking an appeal, petitioner persisted in filing with the lower court his fruitless Motion to Strike Off Judgment.

When the Pennsylvania Supreme Court ultimately refused to consider that motion and petitioner's subsequent motions as effective in tolling the appeal time, it created no innovation as to petitioner, but instead followed the settled Pennsylvania application of its appeal statute. The Pennsylvania Supreme Court has stated:

". . . We have ruled in a number of cases that proceedings subsequent to a final judgment cannot prolong the mandatory period for taking an appeal unless the court opens the judgment or otherwise stays the proceedings." *Commonwealth v. Mackley*, 380 Pa. 70, 75; 110 A. 2d 172, 175 (1955).

The rule has been a long-standing one: *Fenerty Disbarment Case*, 356 Pa. 614, 619; 52 A. 2d 576, 578 (1947) stated:

"It is settled that a party cannot extend the time fixed by the statute for appeals, after judgment or decree, unless the court suspends execution by opening the judgment or decree or otherwise stays proceedings . . ."

It will be noted that the lower court, in the instant case, never opened the February judgment nor in any other way granted a stay of proceedings.

Motions for reargument, similar to petitioner's motions, do not stop the running of the statutory period allowed for appeal: *Seem's Estate*, 341 Pa. 198, 199, 200; 19 A. 2d 60, 61 (1951).

Even a rule for a rehearing does not stop the running of the time, at least in the absence of a stay of proceedings: *Hanna Estate*, 367 Pa. 337, 339; 80 A. 2d 740, 741 (1951).

Moreover, Pennsylvania law reasonably and logically bars petitioner from successfully claiming that his appeal to the Pennsylvania Supreme Court should have been considered as taken from the refusals of the motions he filed in May, June and August, 1958. The Pennsylvania Supreme Court has clearly held that an appel-

lant cannot save his right to appeal a question which a court has declined to reconsider, by the device of treating his appeal as one from the refusal of reconsideration. A lower court's refusal to allow reargument is not appealable: *Baily Petition,* 365 Pa. 613, 619; 76 A. 2d 645, 648 (1950).

Beaver Valley Water Co. v. Pa. P.U.C., 140 Pa. Super. 297, 302; 14 A. 2d 205, 208 (1940) succinctly stated the rule as follows:

> "A party litigant cannot be permitted by a motion or petition to reconsider, or hear and modify, an appealable order from which no appeal was taken within the statutory period allowed by law, to reopen the matter thus disposed of and thereby nullify the limitation for appeal fixed by statute."

The Pennsylvania decisions cited in the Petition for Certiorari on this point are inapplicable. A number of them deal with judgments which were entered, not by the court, but by a court clerk upon an ex parte confession of judgment or by other means. *Polis v. Russell,* 161 Pa. Super. 456, 55 A. 2d 558 (1947), and other such cases simply hold that where a judgment is entered ex parte by the clerk, and the court thereafter, for the first time, considers the matter upon a rule to strike or a rule to open, the first and final decision of the court on such matters is an appealable decision. This approach satisfies the rule that if no hearing is afforded before judgment, then a hearing after judgment will meet the requirements of due process: *American Surety Co. v. Baldwin,* 287 U.S. 156, 168, 77 L.Ed 231, 239 (1932).

An appeal from a judgment which is merely erroneous or voidable must be taken within the statutory ap-

peal period, which is inapplicable only if the judgment is void for lack of jurisdiction of the person or the subject matter; *Clarion M. & P. R. Co. v. Hamilton,* 127 Pa. 1, 3; 17 Atl. 752 (1889). Therefore, the cases cited in the Petition for Certiorari are inapplicable here, because they relate to judgments which were void on their face: *Romberger v. Romberger,* 290 Pa. 454; 139 Atl. 159 (1927); *Johnson v. Royal Ins. Co.,* 218 Pa. 423, 425; 67 Atl. 749 (1907); *Samango v. Hobbs,* 167 Pa. Super. 399; 75 A. 2d 17 (1950); *Crescent Township Road,* 18 Pa. Super. 160, 167 (1901).

Petitioner's claim that the lower court judgment was void by reason of fraud is insupportable because, even if petitioner's fantastic claims of mistreatment at the hands of federal authorities in another part of the country were to be taken as true, they nevertheless show no fraud germane to the state court proceeding.

The judgment was entered against the petitioner in the state court proceeding simply because his second attempt at a complaint failed to state a cause of action, even when taken at face value.

In addition, petitioner's constant unwillingness to prosecute his case within allowable time limitations has been manifested at every level of this proceeding, as witness his filing of the May 26, 1958 Motion to Strike, when he could have appealed.

On August 26, 1958, when petitioner filed additional motions in the lower court, it was obvious that the three-month appeal period had expired as to the February 26th judgment. It is apparent that those additional motions were filed in an attempt to revive the matter

for purposes of the appeal which petitioner entered in the Pennsylvania Supreme Court on that same day in August, 1958. However, where an appeal from the original judgment is too late, a party cannot obtain further review by concocting an appeal based on the lower court's refusal to open the prior judgment, where that judgment at most was merely erroneous and not void: *Friel v. Beadle,* 320 Pa. 204; 182 Atl. 517 (1936). This rule applies equally to cases, such as the instant one, where the original judgment is entered as a matter of law on the pleadings: *Pennock v. Kennedy,* 153 Pa. 579; 26 Atl. 217 (1893).

Therefore, Pennsylvania law clearly demonstrates that the Pennsylvania Supreme Court decision quashing the appeal was a proper one.

The Pennsylvania Supreme Court procedure of quashing the appeal on motion and reply, without oral argument, was also proper, because due process does not require that oral argument be allowed on questions of law: *Price v. Johnston,* 334 U.S. 266, 286; 92 L. Ed. 1356, 1369 (1947); *Federal Communications Com. v. Station WJR,* 337 U.S. 265, 274, 275; 93 L. Ed. 1353, 1360 (1948).

The quashing of petitioner's appeal by the state court was, in any event, a decision relating to matters of state procedure and the interpretation of a state statute which involved no federal question.

CONCLUSION

Respondent submits that the Petition for Writ of Certiorari presents no sound reason why the writ should be granted. The state court has not decided any federal question of substance.

Respectfully submitted,

W. S. MOORHEAD
DAVID W. CRAIG
MOORHEAD & KNOX
Attorneys for Marilyn Ferguson, Respondent.